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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1973

No. 73-11

ASSOCIATED STUDENTS OF WESTERN KENTUCKY UNIVERSITY, ET AL., - Petitioners

versus

DERO G. DOWNING, ET AL., - - Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

THOMAS L. HOGAN
205 South 4th Street
Louisville, Kentucky 40202

ROBERT ALLEN SEDLER
Box 862
University Station
Lexington, Kentucky 40506

Attorneys for Petitioners

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on March 28, 1973.

Opinions Below

The decision of the United States Court of Appeals for the Sixth Circuit is unreported as yet and set forth in the Appendix, *infra* at pp. 9-12. The memorandum decision of the United States District Court for the Western District of Kentucky is unreported and is set forth in the Appendix, *infra* at pp. 13-20.

Jurisdiction

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 28, 1973. The jurisdiction of this Court is involved pursuant to 28 U.S.C. Section 1254 (1).

Questions Presented

1. Whether the cancellation of "The Films of John Lennon and Yoko Ono" and "Genesis 4" by Respondents constituted an impermissible act of governmental censorship in violation of rights guaranteed to the Plaintiffs-Appellants and to the students of Western Kentucky University by the First and Fourteenth Amendments to the Constitution of the United States.

2. Whether the absence of officially-promulgated and constitutionally valid standards governing film selection and the content of educational and cultural programs precluded Respondents from prohibiting the showing of films selected by the Petitioners or the conducting of educational and cultural programs sponsored by the Petitioners.

3. Whether "The Films of John Lennon and Yoko Ono," taken as a whole, including the portion of it entitled "The Fly" is entitled to the protection of the First Amendment and is not obscene under constitutional standards.

Statement of the Case

Petitioner Associated Students of Western Kentucky University is the duly constituted and officially recognized student government of Western Kentucky University. Said Association is financed out of the University's budget (*Infra* p. 3a). A mandatory student activities fee is assessed against all full time students (T. R. 21).*

Associated Students, as part of a social, cultural and educational program contracted with Genesis Films, Ltd. for the showing of a film program entitled "The Films of John Lennon and Yoko Ono." Said films were scheduled to be shown on February 2 and 3, 1972. All agreements entered into by the student group required the co-signature of a University official (*Infra* 5a).

Respondent Keown, after viewing the film, stated it was "gross" and refused to allow it to be shown as scheduled (T. R. 186-7).

There are no standards or guidelines to determine what pictures may or may not be shown on campus (T. R. 110, 164). As co-signer to the booking contract, the University cancelled this movie and also a scheduled showing of "Genesis 4" prior to having viewed it. This was the first time that a movie had been viewed prior to its public showing and the first time a movie had been cancelled by the University (T. R. 120-1).

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*"T.R., refers to the Transcript of Record of the May 12 1972 hearing.

The movies were originally approved by a committee of students and a representative of the Dean of Students' Office (T. R. 120).

The usual basis, in the past, for selecting films, was that they be the type not normally offered on a commercial basis and would attract student patronage (T. R. 73, 164). Admission was to be charged and restrictions placed on those allowed in (T. R. 117).

Respondents refused to allow the movie to be shown because of Respondent Keown's opinion that said movie was inappropriate for showing on a university campus and is obscene within the meaning of KRS 436.101 (Respondent Keown's answer).

On June 5, 1972, the District Court dismissed the complaint after a full evidentiary hearing. He found that there had been no constitutional violation (*Infra* 3a-12a).

The Court of Appeals affirmed, on the grounds that there had been no Constitutional violation and that all the University had done was to make a determination that it would be "inappropriate for the University to continue as a contracting party". It is to review this judgment that petitioners seek certiorari.

Reasons for Granting the Writ

Certiorari should be granted because the Court below has decided an important federal question in a manner which conflicts with decisions of this Court.

The blatant censorship and prior restraint, on the part of Petitioners manifestly offends the requirements

and safeguards of the First Amendment. The total lack of standards does not even acknowledge the existence of the Fourteenth Amendment. This Court has held the Constitution applies to schools as well as to the non-academic world. The decisions below have clouded that principle as though this case merely involved "contract rights".

1. The decision below is in conflict with this Court's rulings in *Papish v. Board of Curators of University of Missouri*, —— U. S. —— 93 S. Ct. 1197, 35 L. Ed. 2d 618 (1973) and *Healy v. Jones*, —— U. S. —— 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972).

In *Papish*, the petitioner was expelled for distributing a newspaper with allegedly obscene material. This Court reversed, *per curiam* on the grounds that the dissemination of ideas, no matter how offensive, cannot be denied in the name only of "conventions of decency." Although there was some testimony that the movies in question here could have been shown off campus, the objection was that the material was "offensive." Thus, the Petitioners were denied access to show the movie because of its *content* rather than the time, place or manner of its showing.

As this Court has repeatedly held, State universities are not "enclaves immune from the sweep of the First Amendment". This is exactly what Respondents are attempting to do. They are clothing themselves as just a co-contracting party that can withdraw their consent, without regard to the Constitutional issues involved.

In *Healy* the issue was whether or not the Students for a Democratic Society Chapter would be granted

university approval. Apparently the University took the position that they were not forbidding the forming of the chapter but merely denying it university approval. Here the University may say that they were not denying that the movie could be shown but merely that it could not be shown with the University as a co-contracting party. However, it is this "subtle governmental inference" that is as much a violation of the Constitutional rights of Petitioners as are the "heavy handed frontal attacks".

Carried to its fullest, the University's position could proscribe anything—speech, movie, book—that it found offensive. Nowhere in the record have they met the heavy burden to justify their conduct.

The "practical reality" referred to in *Healy* is that the student budget is totally intertwined with that of the University. They are effectively precluded from sponsoring any program without the University as a co-contracting.

This is not to say that the University can be put in a position that they would have to co-sponsor any program planned by the students—only that their reasons for so refusing not violate the Constitution.

This case involved an obvious and blatant censorship which overrides any imagined legitimate interest the University might have in protecting its self established image.

2. The total lack of standards violates the rights of Petitioners to due process.

Many cases of this nature involve the legitimacy or necessity of standards which lead to the curtailing of

a Constitutional right. However, in this instance there are no standards. The decision was based strictly on the opinion of the Dean of Students, who was the only University person to preview the movie. There was no "expeditious review procedure." *Freedman* v. *Maryland,* 380 U. S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965). Discretion this broad cannot be considered regulation "with narrow specificity". *Keyishian* v. *Board of Regents of New York,* 380 U. S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1971).

The Court below distinguished this case from the various speaker ban cases. (e. g. *Brooks* v. *Auburn University,* 412 F. 2d 1171 (5 Cir., 1969). However there is no legal justification to so distinguish merely because the subject matter is a movie. The movie was banned the day of its planned showing. Thus, the Petitioners had no reason to believe the University would act in this manner, based on past experience and the latter's voluntary agreement to be a co-contracting party but the students also were precluded from any effective review of that decision.

The Petitioners, at the very least, are entitled to these basic Constitutional Rights.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

THOMAS L. HOGAN
205 South 4th Street
Louisville, Kentucky 40202

ROBERT ALLEN SEDLER
Box 862
University Station
Lexington, Kentucky 40506

Attorneys for Petitioners